

CPLR Does Not Specify When Motion for Contribution May Be Made

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only prevented the abatement of the action, but also precluded the Pennsylvania Insurance Commissioner (receiver) from suing to recover the assets of the defendant in New York (the bond). Thus, the decision appears to be in accord with the underlying philosophy of the UIILA.

ARTICLE 12 — INFANTS AND INCOMPETENTS

Preference given to nominee of the relatives of incompetent when appointing a committee.

In a recent case, the appellate division, first department,¹²³ modified the decision of the lower court which had granted a petition for the appointment of a committee for an incompetent. The appellate court removed the court-designated committee and replaced her with the committee which had been recommended to the lower court by the relatives of the incompetent. The modification was based upon the fact that the two nominees (the one proposed by the relatives and the one appointed by the court) appeared to be equally acceptable, and, therefore, the one nominated by the relatives should have prevailed.

The court's ruling is in accord with prior law. The fourth department stated the rule well when it held that "consanguinity is considered . . . in the selection of a committee . . . and will not be disregarded except upon valid grounds."¹²⁴

This rule appears to be in the best interests of the incompetent. Since it thus helps to fulfill the primary purpose for which committees are appointed, courts should not be loath to remove the court-appointed committee if there appears to be no substantial objection to the committee preferred by the incompetent's next of kin.¹²⁵

ARTICLE 14 — ACTIONS BETWEEN JOINT TORT-FEASORS

CPLR does not specify when motion for contribution may be made.

Contribution among joint tort-feasors is dealt with in Sections 1401 and 1402 of the CPLR. These sections provide the "how" and "why" of bringing an action for contribution, but do not specify "when" the action may be commenced.

¹²³ *In re Beatty*, 21 App. Div. 2d 969, 252 N.Y.S.2d 953 (1st Dep't 1964).

¹²⁴ *In re West*, 13 App. Div. 2d 599, 600, 212 N.Y.S.2d 832, 833 (3d Dep't 1961). For additional cases in support of this point, see those cited in *West* at 600, 212 N.Y.S.2d at 834.

¹²⁵ The appointment of a committee, formally governed by CPA §§ 1356-84, is now governed by N.Y. MENTAL HYGIENE LAW §§ 100-13.

In *Stern v. Yasuna*,¹²⁶ Satozky, one of the co-defendant tort-feasors, paid the entire judgment after the appellate division had affirmed the liability of all the defendants. Two of the joint tort-feasors received permission to appeal to the court of appeals. While this appeal was still pending, co-defendant Satozky made his motion for contribution, which the court granted.

A prior case (apparently the only one in point) in the New York City Civil Court¹²⁷ had held that the co-defendant was required to await the outcome of the final appeal before seeking contribution. The court reasoned that had the legislature intended to permit the motion immediately, it would have been specifically provided for in the statute.

The court in the instant case concluded that the "movant is clearly entitled to the contribution," and added that the other defendants might apply to an appellate tribunal for the stay denied them at the trial level.

The practitioner must be aware that this area is still unsettled. The two lower courts each interpreted the legislature's failure to provide the "when" as they felt it should be interpreted. The sections are susceptible to either interpretation.

It is submitted that the reasoning in *Stern* seems sound, inasmuch as the defendants do have a remedy under CPLR 5519 to stay the enforcement of the judgment.

ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

Opening of a default under CPLR 2004.

In a recent case¹²⁸ involving a tort action against the City of New York, the plaintiff appealed from an order which granted defendant-city's motion to compel plaintiff to accept a tardy answer. The supreme court, appellate division, affirmed the order, but denied the imposition of costs against plaintiff.

Under CPLR 2004 the court in its discretion may extend the time in which pleadings are required to be served, even though the application for the extension is made after the expiration of the statutory period, and is thus, in effect, an application to open a default. Under this section the applicant must show "good cause" why he cannot, or could not, comply with the applicable time requirement. The court stated that in view of the nature of this tort action, it must have been apparent to the plaintiff's counsel that the City was not deliberately defaulting,

¹²⁶ 44 Misc. 2d 185, 253 N.Y.S.2d 439 (Sup. Ct. 1964).

¹²⁷ *Salvatore v. City of New York*, 184 Misc. 823, 55 N.Y.S.2d 463 (Civ. Ct. 1945).

¹²⁸ *Bermudez v. City of New York*, 22 App. Div. 2d 865, 254 N.Y.S.2d 420 (1st Dep't 1964).